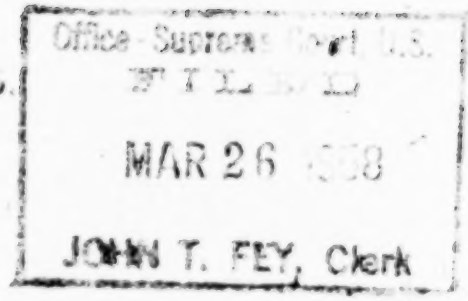
LIBRARY
SUPREME COURT, U. S.



No. 804

In the Supreme Court of the United States

OCTOBER TERM, 1957

JIMMY JAMES BOUZIDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes and regulations involved	2
Statement	7
Argument	13
Conclusion	21

CITATIONS

Cases:

Blalock v. *United States*, 247 F. 2d 615	19
Communist Party of United States v. *Subversive Activities Control Board* (C. A. D. C., No. 11,850, decided Janurry 9, 1958)	18
Estep v. *United States*, 327 U. S. 114	14
Goldman v. *United States*, 316 U. S. 129	20
Gonzales v. *United States*, 348 U. S. 407	17
Jencks v. *United States*, 353 U. S. 657	18, 19, 20
Sicurella v. *United States*, 348 U. S. 385	8, 15, 16
Simmons v. *United States*, 348 U. S. 397	16
United States v. *Erikson*, 149 F. Supp. 576	21
United States v. *Jones*, 142 F. Supp. 806, affirmed 241 F. 2d 704	20
United States v. *Nugent*, 346 U. S. 1	16, 18, 19
United States v. *Stasevic*, 117 F. Supp. 371	21
Witmer v. *United States* 348 U. S. 375	14

Statutes and regulations:

18 U. S. C. 3500 (e)	20
Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:	
Sec. 6 (j) (50 U. S. C. App. 456 (j))	2
Sec. 12 (a) (50 U. S. C. App. 462 (a))	4, 7
32 C. F. R. 1626.25, as amended by E. O. 10659, 21 F. R. 1079, 1083, 1103, Feb. 17, 1956:	
Sec. 1626.25	4

459547—58——1

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 804

JIMMY JAMES BOUZIDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 38–46) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1958 (Pet. 47). The petition for a writ of certiorari was filed on February 24, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was a basis in fact for petitioner's I-A (available for military service) draft classifica-

tion and for denial of his claim to conscientious objector status.

2. Whether the Department of Justice recommendation to the appeal board (on review of the local board's classification action now under attack) erroneously recommended denial of petitioner's conscientious objector claim upon the basis of his belief in theocratic warfare.

3. Whether petitioner was entitled to production of the full F. B. I. investigative report at the administrative hearing on his conscientious objector claim.

4. Whether the full F. B. I. report should have been produced at the trial.

5. Whether the court erred in excluding from evidence the longhand notes of the hearing officer and his report to the Department of Justice.

STATUTES AND REGULATIONS INVOLVED

Universal Military Training and Service Act (62 Stat. 604, 612, 622; 65 Stat. 75, 86):

Section 6 (j) [50 U. S. C. App. 456 (j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving dutes superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemp-

tion from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such

noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *. * * *

Regulations of the Selective Service System:

32 C. F. R. 1626.25, as amended by E. O. 10659, 21 F. R. 1079, 1083, 1103, Feb. 17, 1956:

§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious*

objector. (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I–A–O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I–A–O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I–O, the ap-

peal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I–O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(c) Upon receipt of the recommendation of the Department of Justice, the appeal board

shall mail a copy thereof to the registrant together with a letter advising the registrant that, within 30 days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

STATEMENT

In April 1957, at a trial before the court (jury having been waived), petitioner was convicted in the United States District Court for the Western District of Oklahoma for refusal to obey an order for induction into the armed forces of the United States in violation of 50 U. S. C. App. 462. He was sentenced to two years' imprisonment (R. 4–5, 10, 11, 12, 87). On appeal (R. 10–11), the judgment was unanimously affirmed (Pet. 47).

459547—58——2

1. At the trial, petitioner's selective service file was introduced in evidence as Government Exhibit 1 (R. 13). The background evidence may be summarized as follows:

In his classification questionnaire, received by his local board on March 4, 1952, petitioner stated that he was born on February 21, 1933; that he had been a minister of the Jehovah's Witnesses since July 1942; and that he was conscientiously opposed to participation in war in any form (R. 88–90). In his Form 150 (Special Form for Conscientious Objector), petitioner stated, "My belief in a supreme Being does not involve duties in Military affairs. My commission and ordination as a Minister comes from God" (R. 97). Petitioner was classified I-A (available for military service) by the local board on April 2 and again on April 16, 1952 (R. 90, 91). Upon appeal, his file was forwarded to the United States Attorney for an advisory recommendation by the Department of Justice as to the conscientious objector claim (R. 91). The hearing officer was given an F. B. I. résumé dated July 16, 1952, as to petitioner's claim (R. 110–113). On December 4, 1952, the Special Assistant to the Attorney General recommended that petitioner's objections to combatant and non-combatant service should not be sustained, at least in part on the ground that petitioner believed in theocratic warfare and was willing to fight in self-defense[1] (R. 97–99). On December 17, 1952, the appeal board classified peti-

[1] The later case of *Sicurella* v. *United States*, 348 U. S. 385, held that such beliefs were not grounds for denial of a I–O classification.

tioner I-A (R. 91). Prosecution, by reason of petitioner's refusal to be inducted, was started but was later dismissed, and petitioner's file was ordered reopened (R. 91–92, 99–100).

On May 4, 1955, the local board again classified petitioner I–A (R. 92, 104). In a letter of May 9, 1955, from petitioner to the local board, he expanded on his reasons for classification as a minister or as a conscientious objector (R. 101–103). On June 1, 1955, petitioner took an appeal from his I–A classification (R. 93, 103). In a letter of June 2, 1955, from the local board to the appeal board, it was stated that petitioner's claim for classification as a minister was denied. The local board did not consider him a "regular" minister, since he stated he worked only 3 or 4 hours per week as a minister and 40 hours as a painter earning $2 per hour (R. 104–105). The file was then forwarded to the appeal board, and later to the Department of Justice for investigation of the conscientious objector claim (R. 93, 105–107).

A résumé of the F. B. I. inquiry dated September 22, 1955 (R. 113–121), contained some favorable comments by observers that petitioner's actions were "very good" (R. 114); that he was "sincere" in his conscientious objector claim and in his religious beliefs (R. 115, 117, 118, 121); and that he was a person of "excellent character" and reputation (R. 116, 117, 118). This résumé also included some unfavorable comments that several warrants had been issued against petitioner for traffic violations in Wichita, Kansas; that after having been arrested in Pratt, Kansas, for running a stop sign, he was "very bellig-

erent" (R. 116); that his religious work for Jehovah's Witnesses was far below the average of other members of the congregation; that he was not sincere in his conscientious objector claim; that the local board at Alva, Oklahoma, had offered him a I–O (conscientious objector) classification to do hospital work, but he had refused this, in asking for a IV–D minister classification (R. 119); and that most persons interviewed at Alva believed that petitioner's "home environment, being raised by an uncle who was a convicted bootlegger, is inconsistent with his claim of being a conscientious objector, based upon his religious training and beliefs" (R. 120). On December 23, 1955, petitioner wrote to hearing officer Evenson, requesting production of the complete F. B. I. report so that he might compare it with the résumé to see whether the résumé was fair. He also asked that the report be forwarded to the appeal board to enable the board to consider the favorable as well as the unfavorable evidence (R. 121–122). Petitioner was not given the F. B. I. report as requested. In a letter of January 4, 1956, to hearing officer Evenson, petitioner pointed out that the résumés of July 16, 1952, and of September 22, 1955, were unfair as questioning the moral conduct of certain of his acquaintances and relatives for whom he was not responsible (R. 124–125).

Petitioner appeared before hearing officer Evenson in Pueblo, Colorado, on January 6, 1956, and was accompanied by his wife and brother. The recommendation of the Department of Justice to the appeal board reported that the hearing officer observed that

petitioner was evasive and seemed to lack knowledge of the Bible in general. Petitioner first denied drinking, but later admitted he had drunk intoxicating liquors and still drinks beer. He denied any arrests, but later admitted that several traffic warrants had been issued against him in Wichita, and that he had been arrested for running a stop sign in Pratt, Kansas. Petitioner did not seem able to answer the question as to how a person becomes a member of Jehovah's Witnesses until pressed upon specific points, after which he responded that he became a member through Bible study, attending meetings, and baptism in 1942 (R. 129). Petitioner stated that his allegiance was to the government of Jehovah, not to any man-made government, where a conflict existed; and that he would defend himself, his family, and brothers in the faith against foreign invaders (R. 129–130). Petitioner stated to the hearing officer that he was not against noncombatant service as such, but felt that he could not participate in it because it would interfere with his ministerial duties (R. 130). The hearing officer recommended that petitioner's appeal be denied. As stated in the report (R. 131):

> The Hearing Officer found that the general appearance and conduct of the registrant at the hearing failed to show sincerity and good faith. He concluded that the registrant is not opposed to participation in combatant or noncombatant military training and service by reason of his religious training and belief and he recommended that the appeal of the registrant be not sustained.

The Department of Justice recommended that petitioner's claim should not be sustained (R. 128–131). On March 13, 1956, the appeal board forwarded to petitioner a copy of the Department's recommendation, and informed him that under the regulations he would have 30 days to file a written reply (R. 133). On April 15, 1956, petitioner wrote the appeal board, "I hereby request that my letters and files be considered by the appeal Board at the next meeting" (R. 134). On June 21, 1956, the appeal board classified petitioner I–A by a 4-to-0 vote (R. 93). Petitioner was ordered to report for induction on July 24, 1956, but on the following day he refused induction (R. 93, 135–137). The prosecution followed.

2. At the trial, petitioner, his wife, and his brother all testified in contradiction of the hearing officer as to what occurred at the January 6, 1956, hearing. They testified that petitioner was not evasive and that no questions were asked about the Bible (R. 59, 36, 16–17); that he told the hearing officer that a person became a member of Jehovah's Witnesses by Bible study and baptism (R. 60–61, 38, 15–16); that petitioner had never been arrested and been belligerent, but had only been issued a ticket for running a stop sign (R. 60, 68–69, 37, 18); and that petitioner did not tell the hearing officer that he was not against noncombatant military service, but stated that he was conscientiously opposed to all military service (R. 61, 38, 20–21). Petitioner testified that, at the end of the hearing, the hearing officer stated that he would rule

in petitioner's favor and recommend a conscientious objector's classification (R. 62).

Petitioner had served a subpoena on the hearing officer calling for production of the hearing officer's longhand notes regarding the hearing and the hearing officer's report to the Department of Justice which was referred to in the letter from the Department to the appeal board (R. 47–48). Before the court ruled on the validity of that demand, the hearing officer testified as a defense witness. He said that he did not use the F. B. I. report at the hearing, but did read it over prior to the hearing and compared it with the résumé, which he did use. He stated that the F. B. I. report was about three or four times more voluminous than the résumé (R. 50–51). The request for production of the notes and report, as well as for the full F. B. I. file, was denied (R. 52–56, 80–82).

The hearing officer, called by the Government in rebuttal, denied that he had told petitioner he would sustain his claim as a conscientious objector, and denied petitioner's testimony that no questions had been asked concerning the Bible (R. 83). On cross-examination concerning the issue of the questioning on the Bible, the hearing officer stated that his notes contained a memorandum about the question on the Bible (R. 84). A renewed demand for production of the notes was denied (R. 84–86).

ARGUMENT

1. Petitioner's contention that the denial of a conscientious objector classification by the appeal board was without basis in fact, so that the final I–A (avail-

able for military service) classification was arbitrary and capricious (Pet. 16–18), disregards the narrow scope of review given to an appellate court for overturning the Selective Service System's refusal to grant conscientious objector status. Courts are not empowered to substitute their judgment on the weight of the evidence for those of the administrative boards. The classification can be overturned only if it has "no basis in fact." *Estep* v. *United States,* 327 U. S. 114, 122; *Witmer* v. *United States,* 348 U. S. 375, 380–381.

There was ample basis in fact for denial of petitioner's claim. The hearing officer found that petitioner was evasive and that his testimony regarding his drinking habits, previous traffic arrests, and the requisites for becoming a Jehovah's Witness was vacillating (R. 129). There were reports that petitioner was not an active member of Jehovah's Witnesses, reports which petitioner's lack of knowledge as to requisites of membership tended to confirm. Issues of sincerity must, to a large extent, depend on impressions of the applicant in person. Here, both the draft board before which petitioner personally appeared (see R. 92–93) and the hearing officer reached the conclusion that petitioner was not sincere.

The basis in fact for petitioner's I–A classification was not eliminated, as he suggests (Pet. 22–25), by reference in the F. B. I. résumés to his uncle's conviction as a bootlegger and to petitioner's living near women of immoral character. The résumés merely mentioned these incidents as parts of peti-

tioner's environmental background, and did not purport to make them conclusive or even significant as to the sincerity of his conscientious objector claim. In the language of the court below, these occurrences did probe petitioner's "subjective sincerity." (Pet. 45). The recommendation by the Department of Justice against petitioner's claim for exemption (R. 128–131) did not mention these incidents as being in any way determinative. Instead, the conclusion of lack of sincerity was based upon a composite of all information in the résumés and an appraisal of the general appearance and conduct of petitioner before the hearing officer.

2. There is no merit to petitioner's contention that the Department of Justice recommendation on the second appeal recommended denial of a conscientious objector classification upon the basis of an illegal ground (*i. e.*, belief in theocratic warfare), contrary to the holding in *Sicurella* v. *United States*, 348 U. S. 385 (Pet. 18–20).

On petitioner's first appeal, the Department of Justice based its recommendation against a I–O classification to a great extent upon petitioner's theocratic warfare belief (R. 98–99). After *Sicurella* was decided, petitioner's original prosecution was dropped and a second round of classification proceedings was commenced *de novo* (R. 92). The error tainting the record up to the time of the reopening of the classification was then no longer present.

In the Department of Justice recommendation on the second appeal, unlike the first recommendation, be-

lief in theocratic warfare was not assigned as a reason for denial of the conscientious objector claim. It is true that it was mentioned in passing (R. 129–130) as part of petitioner's general background; but there is no statement, express or implied, recommending that the appeal board consider such belief as a ground for denial of the conscientious objector classification. It is a fair inference that the appeal board members were aware, after the *Sicurella* decision, that petitioner's willingness to fight in theocratic warfare could not be, and was not, considered a reason for denial of a conscientious objector classification.

3. Petitioner contends (Pet. 20–22) that he was denied procedural due process when not permitted to inspect the complete F. B. I. report regarding his conscientious objector claim prior to or at the administrative hearing, so that it could be compared with the résumé to ascertain if any favorable evidence had been omitted. The contention is foreclosed by this Court's opinion in *United States* v. *Nugent*, 346 U. S. 1. This Court there held (at p. 6):

> We think the Department of Justice satisfies its duties under § 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report.

Similarly, in *Simmons* v. *United States*, 348 U. S. 397, this Court reaffirmed *Nugent* while recognizing a reg-

istrant's right to a fair résumé of all adverse information in the F. B. I. report in order that he might explain, rebut, or detract from the damaging force of the adverse evidence.

No element of fair play was denied petitioner as a result of refusal to produce the full F. B. I. report. Petitioner complains that favorable evidence was omitted from the résumé,[2] but even now he does not specify what this evidence was, or how it would have authorized the desired conscientious objector classification. The résumé did contain information which was favorable as well as unfavorable (Statement, *supra,* pp. 9–10). Petitioner himself knew better than any other person what evidence would prove favorable to his purpose. He had ample opportunity of presenting any such evidence to the hearing officer and to the appeal board before its final ruling. Instead of suggesting favorable evidence, in his letter to hearing officer Evenson (R. 124–125), he confined himself to answering derogatory information in the two résumés. And, after receiving the Department of Justice recommendation to which he was invited to reply (cf. *Gonzales* v. *United States,* 348 U. S. 407), petitioner merely wrote the appeal board: "I hereby

[2] Although the hearing officer testified that the F. B. I. report was about three or four times more voluminous than the résumé, it does not necessarily follow that favorable evidence was omitted. The hearing officer, in accounting for the smaller size of the résumé, explained that in it the names and addresses of witnesses were omitted, and that in the full F. B. I. report there were individual sheets for each agent's investigation of individual witnesses (R. 51).

request that my letters and files be considered by the appeal Board at the next meeting" (R. 133, 134).[3]

4. Petitioner's reliance upon *Jencks* v. *United States*, 353 U. S. 657, as in effect overruling, or at least devitalizing, the force of *Nugent* to render the full F. B. I. report subject to compulsory production at petitioner's trial, is misplaced. The ruling in *Jencks* is that reports by a Government witness as to matters to which he has testified on the stand must be produced to the defense for purposes of impeachment. Such reports perform a vastly different function than F. B. I. reports in conscientious objector cases. The recommendation of the Department of Justice, which is in itself merely advisory to the draft board, cannot be deemed the equivalent of the testimony of a prosecution witness. The recommendation represents a conclusion of the hearing officer, based not alone on the F. B. I. reports, but on those reports in relation to the whole hearing, and particularly in relation to the testimony of the registrant, who is told of and given an opportunity to rebut the material in the

[3] Petitioner asserts (Pet. 22) that the ruling of the court below conflicts with *Communist Party of the United States* v. *Subversive Activities Control Board* (C. A. D. C., No. 11,850, decided January 9, 1958), holding that the rule in *Jencks* v. *United States*, 353 U. S. 657, applies to an administrative proceeding before the Subversive Activities Control Board. However, even apart from the significant differences between that agency and the Selective Service System, the *Communist Party* case required production of reports to the F. B. I. by a particular witness (Mrs. Markward) who had testified in the Government's case before the Board; here, petitioner seeks a complete F. B. I. file for a roving inspection, which plainly is not authorized by *Jencks*.

reports. The only question before the trial court to which the recommendation relates is whether there was basis in fact for the classification made by the Selective Service Board. Reports which are never produced to the Selective Service Board cannot show that the Board acted arbitrarily. If, therefore, the reports need not be produced at the hearing, there is no reason why they should be produced at the trial. Moreover, to produce them at the trial would result in the very type of unlimited, unspecific "fishing expedition" which the *Jencks* decision explicitly stated it was not sanctioning.

There is no conflict of circuits on this issue. The ruling of the court below is in accord with that of the carefully considered opinion of the Fourth Circuit in *Blalock* v. *United States,* 247 F. 2d 615, also decided after *Jencks.* As that decision and the decision below point out, the impact of the *Nugent* holding cannot be avoided by presenting the claim for production of the F. B. I. reports in the form of a need to check the fairness of the résumé, at least not in a case such as this, where nothing has been shown as furnishing a basis for any claim that the résumé was unfair.

5. Petitioner also attacks the ruling of the District Court in refusing to order production of the hearing officer's longhand notes and the hearing officer's report to the Department of Justice. At the trial, the hearing officer was called by the Government as a rebuttal witness and was asked whether he had in fact questioned petitioner about the Bible. This was prompted by petitioner's testimony (con-

trary to the Department's letter to the draft board) that the hearing officer had not done so. The notes and report, therefore, did have a bearing on credibility, and the comments of the court appear to indicate that, had the *Jencks* decision been handed down by the time of the trial, the court would have ordered their production (see R. 84–86).

Nevertheless, we believe that the court below was correct in holding that production was not required. The notes are not the type of statement to which the *Jencks* opinion related. Nor are they a statement by the witness as defined in 18 U. S. C. 3500 (e), the recently enacted statute (Pet. 51–53) permitting production in certain circumstances; this statute defines statement as "a written statement made by said witness and signed or otherwise adopted or approved by him * * *." As the court below pointed out (Pet. 44), the notes here were "a personal aid to one performing a quasi-judicial function and totally uncommunicated" and "the prosecution had neither knowledge of nor control of the hearing officer's notes." Compare *Goldman* v. *United States,* 316 U. S. 129, 132. Similarly, the hearing officer's report was an interdepartmental report by "one performing a quasi-judicial function" (Pet. 44). Cf. *United States* v. *Jones,* 142 F. Supp. 806, 820–821 (E. D. S. C.), affirmed, 241 F. 2d 704 (C. A. 4). The hearing officer can scarcely be likened to the kind of partisan, accusatory informants involved in *Jencks.* Moreover, the testimony of the informants involved in *Jencks* was "crucial * * * to the Government's case" (353 U. S. at 667); here, on the other hand,

the hearing officer was called by the Government only as a rebuttal witness on what essentially was a collateral issue—*i. e.*, whether the hearing officer had questioned petitioner about the Bible.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MARCH 1958.

---

[4] There is no holding (see Pet. 27) in *United States* v. *Erikson*, 149 F. Supp. 576 (S. D. N. Y.), that a registrant may compel production at his trial of a transcript of the testimony before the hearing officer. In that case, the transcript had been marked Government's Exhibit 4 (149 F. Supp. at 578), and apparently had been produced voluntarily. There is no requirement in the statute or regulations that a stenographic record of the hearing be made part of the administrative record. *United States* v. *Stasevic*, 117 F. Supp. 371, 375 (S. D. N. Y.)

U. S. GOVERNMENT PRINTING OFFICE: 1958

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
APR 29 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 804

JIMMY JAMES BOUZIDEN, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

Supreme Court of the United States

OCTOBER TERM, 1957

No. 804

JIMMY JAMES BOUZIDEN, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Now comes the petitioner and requests a rehearing of the decision of the Court denying writ of certiorari in this case on April 7, 1958, because:

I.

This petition is filed pursuant to Rule 58(1) and (2) of the Rules of this Court and the time expires for filing it on May 2, 1958. The petition is filed in time. A substantial ground is available to petitioner not previously presented

that should justify granting the writ as held by this Court in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50 (1938).

II.

The court below held that it was necessary to show that the longhand notes and the typewritten reports of the hearing, being the official records of the hearing officer as to what took place at petitioner's hearing, were of value for impeachment of the officer as a witness for the Government before error of exclusion is shown. See the opinion at page 44 of the petition for the writ in this case. This holding is in direct conflict with *Scales* v. *United States,* 227 F. 2d 581, 592 (4th Cir. 1955), rev'd on other grounds, 355 U. S. 1 (1957); *United States* v. *Lebron,* 222 F. 2d 531, 536 (2d Cir. 1955); *Shelton* v. *United States,* 205 F. 2d 806 (5th Cir.), cert. dismissed, 346 U. S. 892 (1953); *United States* v. *Simonds,* 148 F. 2d 177 (2d Cir. 1945); *United States* v. *Ebeling,* 146 F. 2d 254 (2d Cir. 1944); *United States* v. *Rosenberg* 146 F. Supp. 555, 561-562 (E.D. Pa. 1956), rev'd on other grounds, 245 F. 2d 870 (3d Cir. 1957); *United States* v. *Mesarosh,* 116 F. Supp. 345, 349-350 (W.D. Pa. 1953), rev'd on other grounds, 352 U. S. 1 (1956) (dictum); *United States* v. *Schneiderman,* 106 F. Supp. 731 (S.D. Cal. 1952). These cases were not heretofore called to the attention of the Court.

It seems that this Court inadvertently overlooked that this holding is out of harmony with *Jencks* v. *United States,* 353 U. S. 657 (1957) at pages 667-669. Please consider again what is stated in the petition at pages 14-15, 25-28. The hearing officer, as the chief witness for the Government, contradicted the testimony of petitioner and his witness. [R. 82-83] The longhand notes of the hearing officer and the typewritten report were then demanded for the same purpose that the F.B.I. reports were sought in the case of *Jencks* v. *United States,* 353 U. S. 657 (1957). [R. 83-85] They were excluded from the evidence. [R. 85-86]

WHEREFORE, for the reasons above stated this Court should grant a rehearing, set aside the decision of April 7, 1958, denying the petition and granting the writ of certiorari as prayed for in the petition.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

May, 1958.

CERTIFICATE

I, the undersigned counsel for petitioner, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith. It is made so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON

Counsel for Petitioner